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Civil Action Nos. 85-6052 and 6097 (consolidated) Reply Fried for Cross Appellant

United States Court of Appeals for the District of Columbia Circuit

5/5/86

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 85-6052 and 6097

(consolidated)

ANN B. HOPKINS,

Appellant - Cross Appellee,

v.

PRICE WATERHOUSE,

Appellee - Cross Appellant.

Appeals from the United States District Court
for the District of Columbia

REPLY BRIEF FOR CROSS APPELLANT

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I.

SUMMARY OF ARGUMENT

Notwithstanding plaintiff's current focus on Price Waterhouse's partnership selection process and on the absence of affirmative action to root out of that process the "possible" influence of a phenomenon the presence of which was evidenced only by the speculative testimony of an "expert," this remains a case of alleged disparate treatment. The core allegation is that one or more of the partners who criticized

plaintiff's rude and offensive behavior did so in more intense terms than they applied to such behavior in males. That the stimulus for this alleged differential treatment may have been a social scientific phenomenon does not alter the nature of this claim or its analysis. Plaintiff's claim is simply that one or more of her evaluators treated her differently because of her sex than he treated similarly situated males. That was the contention before the district court.

Plaintiff failed to establish that any partner treated her differently than a male would have been treated./1/ She does not dispute this. Nor could she, as even the district court in its confusing discourse on liability observed that there was no proof that any partner evaluated plaintiff somehow differently than he had evaluated male candidates.

1/ Plaintiff had the full and unfettered capacity to attempt to prove at trial that one or more partners involved in the disposition of her candidacy engaged in disparate treatment. During discovery, all of the partners who criticized plaintiff's interpersonal behavior were identified and were available for deposition. The comments, criticisms and ratings of these partners concerning plaintiff as well as the other partnership candidates between 1981 and 1984 were supplied to plaintiff. Plaintiff had full opportunity to explore in discovery or at trial whether those partners critical of her behavior reacted in the same fashion to similar behaviors by male candidates. Moreover, plaintiff had ample opportunity to explore with each partner the reasons or basis for his criticisms of her or about any other candidate. Plaintiff did none of the above.

Plaintiff acknowledges the absence of any finding of disparate treatment by any specific partner but argues that this is unnecessary to the ultimate liability determination. Plaintiff and the district court's decision appear to contend that because Price Waterhouse failed to include in its selection process safeguards against the crediting of criticisms that may "possibly" have been unconsciously overstated, it was appropriate to place upon Price Waterhouse the burden of proving that overstatement did not in fact occur or influence the decision. That is, because the firm did not "discrimination-proof" its process, it had the burden to prove that partners participating in it did not engage in disparate treatment. Alternatively, plaintiff and the district court seem to feel that because she could not prove that any partner's alleged overstatement of his criticism caused the decision to hold her candidacy, she should not be expected or required to prove that any partner's criticism involved such disparate treatment. Price Waterhouse submits that neither of these excuses for the absence of a finding of disparate treatment can justify the decision.

Beyond the attempt to excuse the gap in the district court's decision, plaintiff's reply brief mounts several diversionary efforts. Among other things, plaintiff makes a half-hearted effort to reargue her theories of liability that were specifically rejected by the district court. She does this not to convince this Court that the rejection of these

claims was clearly erroneous but as a means of allowing her to mischaracterize the subsidiary factual findings made by the district court in dismissing these claims. This sleight of hand is attempted because plaintiff recognizes that those adverse findings conflict or cannot be reconciled with the court's ultimate liability determination. Price Waterhouse addresses plaintiff's attempt to obfuscate.

Plaintiff also fails to explain how the district court could find intentional discrimination and at the same time find that no person intended to discriminate. She attempts to explain away this contradiction by reference to theories of liability in sexual harassment cases. As set forth below, those authorities do not support the proposition that intentional discrimination can be found where no one has intended to adversely treat a female.

Price Waterhouse also takes issue with plaintiff's effort to convince this Court that a reference to grooming and appearance by plaintiff's strongest supporter can somehow constitute the cornerstone for a finding that other partners who reacted negatively to plaintiff's interpersonal behavior engaged in disparate treatment. Plaintiff errs in suggesting that any difference in grooming or appearance standards for males and females violates Title VII.

Finally, plaintiff's reply brief argues that the appeal of Price Waterhouse ignores Rule 52 and the decision of the Supreme Court in Anderson v. Bessemer City, ___ U.S. ____,

105 S. Ct. 1504 (1985). This is not so. Indeed, plaintiff's argument seeks to create the impression that the appeal of Price Waterhouse attempts to reargue the evidence. As the firm's initial brief makes clear, the firm's appeal is directed to the absence of a finding of disparate treatment, the absence of any evidence to support the liability determination, and the erroneous application of the law respecting the allocations of the burdens of production and persuasion, the proof of intent, and the proof of causation in disparate treatment cases.

II.

CONTRARY TO PLAINTIFF'S ARGUMENTS, THE DISTRICT COURT'S FINDING THAT IT COULD NOT HOLD THAT ANY PARTNER ENGAGED IN DISPARATE TREATMENT DOES RENDER THE DISTRICT COURT'S ULTIMATE LIABILITY FINDING CLEARLY ERRONEOUS.

Price Waterhouse's opening brief argued this common sense proposition: Since plaintiff alleged disparate treatment by one or more members of an identified group of partner-evaluators and since the district court determined that plaintiff failed to prove that any of these possible discriminators in fact engaged in disparate treatment, the finding of liability under the disparate treatment theory was clearly erroneous. That is, where a plaintiff alleges disparate treatment in the nature of being judged more harshly for engaging in a particular type of behavior, plaintiff must demonstrate that one or more persons in fact judged the

plaintiff more harshly than they judged or would have judged members of the majority group engaging in the same behavior. Plaintiff's brief acknowledges the absence of any such finding but argues it is unnecessary to sustain ultimate liability. None of her arguments is persuasive and none has any support in the law of Title VII.

A. Liability For Disparate Treatment Is Not Established By Simply Raising The Possibility That Evaluators May Have Treated A Plaintiff Differently And That The Employer Should Have Been Aware Of And Recognized This Possibility.

Plaintiff argues that it was unnecessary for the court to find that any evaluating partner in fact judged her more harshly than similarly situated males. In essence, plaintiff contends she carried her burden of proof of disparate treatment by 1) supposedly demonstrating that the partnership selection process was not altered to preclude the possibility of adverse differential treatment of females; 2) offering testimony of a social scientist who indicated that she was suspicious that differential treatment occurred because different partners expressed in different words their own particular observations of plaintiff's interpersonal behaviors; and 3) by her lawyers' post-trial argument that the firm should previously have been alert to the possibility noted by the expert that one or more partners may have engaged in disparate treatment. This, plaintiff argues, sufficed to shift the burden of proof to Price Waterhouse to prove that none of the evaluating partners in fact engaged in disparate treatment. This argument misreads the law of Title VII.

It is settled law that an employer is not liable for disparate treatment in a promotion decision simply because it maintains a selection process that credits evaluations that could be affected by disparate treatment on the part of an evaluator. Conversely, an employer may be liable where it maintains a tightly structured system designed to foreclose disparate treatment but an evaluator submits an evaluation influenced by disparate treatment which causes an adverse personnel decision. The law is clear that, apart from whether it is dispositive, the fact of differential adverse treatment is at least a necessary predicate for a finding of liability. The plaintiff made no such showing in this case.

There are several methods by which a Title VII plaintiff might prove that an evaluator applied impermissibly different standards to judge the behavior of male and female employees. First, plaintiff could have presented a documentary comparison of the partner's written evaluations of male and female employees. Plaintiff undertook no such presentation at trial, despite having received in discovery the full complement of written materials generated during the admissions processes in 1982, 1983 and 1984 and all of the extant materials from 1981. Not only did plaintiff present no documentary evidence of the application of a different standard by any partner, but the only documentary evidence before the district court established to the contrary. Nearly every partner who criticized plaintiff's interpersonal skills registered the same

criticisms of male candidates. In some instances, the partners used exactly the same words to describe plaintiff and a male candidate.

Plaintiff could have deposed or called at trial the partners who criticized her interpersonal skills in order to explore whether they applied different standards to male and female candidates. She had ample opportunity to do so, but again chose not to present any comparison of any partner's reactions to male and female candidates. Moreover, in the single instance where plaintiff elected to challenge by way of cross examination the derivation and appropriateness of a partner's highly critical remarks about her, the court found the comments appropriate and free of discrimination.

In essence, plaintiff chose to go no further than to have her expert point out the different words that different partners chose to describe her own rude and offensive behavior. Such evidence is at most probative of whether different people have different levels of tolerance for offensive behavior. And even this assumes one could discern differences in the strength of feeling behind a comment by simply reading its words. It further assumes that plaintiff's behavior was absolutely uniform with respect to every partner and every professional staff member with whom she had contact. Needless to say, such "laboratory" conditions did not exist.

Furthermore, the different comments concerning plaintiff's interpersonal skills do not "starkly contrast" with

each other as plaintiff and her expert contended. Plaintiff has identified not even one partner who stated that plaintiff was pleasant, personable, sensitive to others, or well-liked by the members of her staff. Indeed, there is virtual unanimity among supporters and detractors alike with respect to plaintiff's considerable difficulties in the area of interpersonal skills.

The only differences among the comments are ones of word choice and perhaps degree of concern - such as the difference between describing an individual as "hardcharging" and describing that individual as "overbearing." The fact that one partner, based on his contact with plaintiff, found her hardcharging while another, based on a separate contact with plaintiff, found her overbearing, proves only that different partners may have different levels of sensitivity to rude and offensive behavior. This comparison told the district court nothing concerning whether the individual partners might have characterized differently such behavior on the part of a man.

When viewed in the proper light, the plaintiff's theory of liability constitutes an abrupt departure from the rules concerning burdens of production and persuasion carefully developed by the Supreme Court in a series of Title VII decisions. The theory adopted is by no means limited to the admissions process at a large accounting firm, however, and has widespread implications. In essence, the theory creates a new formulation in cases challenging adverse employment decisions

with respect to which more than one evaluator had input. The plaintiff's burden of persuasion under this new formulation can be satisfied as follows: The plaintiff can merely show (a) that she was criticized for interpersonal behavior; (b) that the criticisms were not expressed in exactly the same words by every evaluator; and (c) that the employer did not take affirmative steps to foreclose the possibility that disparate treatment occurred.

At this point, then, the burden of proof shifts to the employer. The employer under this formulation must prove by clear and convincing evidence that none of the evaluators applied a different standard of interpersonal behavior to male employees. It is only at this point in the analysis that the district court's approach would require any examination of the evaluators' evaluations of male employees. Apparently the plaintiff in such a case need only prove that she is female in order to raise a suspicion of disparate treatment sufficient to impose upon the employer the burden of disproving its existence.

This is an astonishing proposition since the plaintiff's issue in such disparate treatment cases is generally thought to be whether individual evaluators themselves used differing standards in assessing the behavior of male and female candidates. Under the theory of this case, employers must defend all employment decisions involving multiple evaluators where the written comments of the evaluators differ semantically. This would be true even where

different evaluators report on different experiences with the employee. Indeed, this would be true where it was established, as here, that the criticisms of the candidate were fair, just and proper in substance and direction. Price Waterhouse maintains that such a theory as to the allocation of the burdens of production and persuasion is inconsistent with the law of Title VII as interpreted by the Supreme Court in Texas Dep't of Comm. Affairs v. Burdine, 450 U.S. 248 (1981), and therefore the district court's finding of liability must be reversed.

B. The Fact That Plaintiff May Have Difficulty Demonstrating That Any Partner's Alleged Disparate Treatment Caused The Hold Decision Does Not Excuse Plaintiff From Being Required To Prove That Such Disparate Treatment Occurred.

Plaintiff argues that the requirement of proof that any individual evaluator engaged in disparate treatment should be overlooked or excused in this case because it would have been impossible, she claims, to determine whether any such allegedly discriminating evaluator's comments caused the Policy Board decision to hold her candidacy. In making this argument, plaintiff accuses Price Waterhouse of "exploit[ing] the collective nature of the [admissions] process by arguing that the decision to exclude plaintiff cannot be pinned on any particular man." (Pl. Reply Br. 18.) Accordingly, she asserts that she need not explore any particular evaluator's judgment or comments because she does not know which partners' opinions carried the day.

Plaintiff has apparently missed the point. Price Waterhouse does not argue that the decision cannot be pinned on a particular partner. In focussing on individual commentors, Price Waterhouse simply makes the observation that plaintiff has not established the alleged discrimination, i.e., the application of a different standard, by even one partner.

Any exploitation that might be occurring here is solely on the part of plaintiff. She has failed to show that any partner applied a different standard, but argues that the collective nature of the partnership process excuses her from any obligation to do so. Instead, she argues that simply pointing out semantic differences in different partners' comments concerning her behavior is sufficient to place the burden upon Price Waterhouse to prove that none of the more negative comments was the result of an application of a different standard to plaintiff's behavior because she is female.

Plaintiff also relies upon a misstatement of the law concerning proof of causation to support her argument that she need not prove that any partner engaged in disparate treatment. Plaintiff argues that the plaintiff's proof of causation in these cases can be minimal and that she needed only to demonstrate that the "hold" decision was "tainted" or in some fashion "infected" with discrimination. From this characterization of the law concerning causation, plaintiff derives the conclusion that her proof of the fact of disparate treatment may be similarly weak or nonexistent. This is

boot-strapping. Even if the law were that a plaintiff need only establish a minimal causal connection between proven disparate treatment and the ultimate decision being challenged, that does not establish that she need not prove the differential treatment or that her proof of such differential treatment may be weak and obtuse. The fact is that this Court should never reach the issue of the appropriate causation standard since the fact of differential adverse treatment has never been established and plaintiff acknowledges this. Even if Day v. Mathews, 530 F.2d 1083 (D.C. Cir. 1976), stands for the proposition that plaintiff need not establish a "but for" causal connection between adverse differential treatment and the decision being challenged, it does not support the argument that plaintiff need not demonstrate adverse differential treatment./2/

2/ On the issue of causation, plaintiff argues that she cannot be faulted if the evidence does not "precisely" demonstrate the effect of any evaluations "tainted" by use of sexual stereotypes, (Pl. Reply Br. 21, 22), and that it is sufficient if she proved that they "played a role" in the challenged decision. (Pl. Reply Br. 24.) It is defendant's burden, plaintiff asserts, to show that those evaluations were not the determinative factor. (Pl. Reply Br. 24-26.)

Once again, plaintiff's statement of the law is based on wishful thinking. It is well established that, to prove unlawful discrimination, the plaintiff must prove that it was a "determinative factor" that "made a difference" in the result. E.g., Bellissimo v. Westinghouse Elec. Corp., 764 F.2d at 179; Cebula v. General Elec. Co., 614 F. Supp. 260, 267 (N.D. Ill. 1985); see McDonald v. Santa Fe Trail Transp. Co., 427 U.S.

(Footnote continued)

C. Summary.

Plaintiff urges a theory that imposes liability whenever it is determined that 1) the possibility of sex stereotyping is present in any given decision; 2) the employer should have been alert to this possibility; and 3) the employer has not taken affirmative steps to root out any possible sex stereotyping. Even if this theory were good law, what is particularly troubling in this case is that liability has been imposed because the court determined that the firm should have been aware of the possibility of sex stereotyping. If the unconscious sex stereotyping implications of comments could be determined by the trial court only on the basis of so-called expert testimony proferred at the rebuttal stage of trial, it scarcely can be said that in 1983 and earlier these implications or the prospect of this phenomenon's operation should have been so evident to Policy Board members -- who are accountants and the like, not social psychologists -- that they should have taken action to "discourage" or "discard" those

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(Footnote continued)

273, 282 n.10 (1976). Here the trial court could not and did not find that the "tainted" evaluations "made a difference" in the result, and that should have been fatal to plaintiff's claim of violation. Unable to say that impermissible sexual stereotyping was the "but for" or "determinative" factor in the Policy Board's hold decision, plaintiff and the trial court vaguely assert that the decision was "infected" or "tainted." (Pl. Reply Br. 24, 27.) But such rhetoric cannot obscure plaintiff's failure to establish the requisite degree of causation.

comments reflecting stereotypes. This is particularly so in view of the fact that neither the trial court nor the plaintiff's expert could identify any specific comment that was in fact influenced by disappointed sex stereotypes, whether these stereotypes were impermissible or otherwise.

III.

PLAINTIFF'S REARGUING OF HER REJECTED THEORIES AND HER MISCHARACTERIZATION OF THE COURT'S FINDINGS ON THOSE THEORIES BETRAY THAT SHE ALSO VIEWS THE LIABILITY DETERMINATION AS IN DIRECT CONTRADICTION WITH THOSE FINDINGS.

As Price Waterhouse observed in its opening brief, the district court made findings rejecting plaintiff's first two theories of liability that directly conflict with the court's liability determination and the findings implicit thereunder. Plaintiff does not address in her reply brief the obvious contradictions and internal conflicts in the district court's decision. Instead, plaintiff engages in an effort to recast or mischaracterize the findings adverse to her theories so as to give the appearance that the contradictions do not exist. All this suggests that even plaintiff cannot support the district court's decision in light of these obvious internal contradictions.

Plaintiff's brief is misleading as to several key issues. Price Waterhouse therefore finds it necessary to provide to this Court a comparison of the district court's findings and plaintiff's distorted misstatements of those findings.

A. The Partners' Concerns About Plaintiff's Interpersonal Skills Were Not Fabricated, Overblown Or Overstated.

While professing to state only undisputed facts, plaintiff represents in her brief that the evidence demonstrates that negative comments about her interpersonal skills "clearly were overblown" and "overstated." Plaintiff then hedges this already rejected contention by mischaracterizing the district court's finding on this point as follows: "The court did not find that concerns about plaintiff's interpersonal skills were entirely groundless." This is a substantial misstatement of the district court's unchallenged finding on this issue: "Plaintiff's conduct provided ample justification for the complaints that formed the basis of the Policy Board's decision." (RE 15 (emphasis added).)

More specifically the court found that the record established that plaintiff was, among other things, rude, insensitive, unduly harsh and difficult to work with. Plaintiff has not appealled from these findings and therefore cannot be heard here to dispute her seriously deficient interpersonal skills nor to pass off criticism of her behavior as "muted concerns." (Pl. Reply Br. 28.) Plaintiff knows the court's findings cannot be reconciled with the theory of disparate treatment upon which the district court found liability. Thus she seeks to obscure the conflict.

B. Plaintiff Failed To Prove That The Policy Board Would Have Recommended For Admission A Similarly Situated Male Candidate.

Plaintiff devotes several pages of her brief to another equally unsuccessful argument - that interpersonal skills criticisms were "not fatal" for otherwise qualified (i.e., similarly situated) male partnership candidates. This argument is not appropriate in this context for two reasons. First, her use here of the term "fatal" and her descriptions elsewhere of the Policy Board as "excluding" or "rejecting" her from partnership grossly mischaracterize the Policy Board's decision. The Policy Board determined that plaintiff's candidacy should be held at least a year so that she would be "afford[ed] time to demonstrate that she ha[d] the personal and leadership qualities required of a partner." (Def. Exh. 37.) The Policy Board agreed to this "hold" decision despite the fact that the comments received would have justified a final determination that she should not be admitted. The "hold" decision was by no means a death knell to plaintiff's partnership prospects, especially in light of the fact that most candidates who are placed on "hold" are admitted in a subsequent year.

More importantly, though, plaintiff simply cannot revive here old arguments that were considered and decisively rejected by the district court. The district court considered the same arguments set forth in her reply brief, and found that "the firm . . . consistently placed a high premium on

candidates' ability to deal with staff and peers on an interpersonal basis," and that male and female candidates were "regularly held because of concerns about their interpersonal skills." (RE 19 (emphasis added).) Furthermore, after reviewing the evidence concerning successful male candidates alleged by plaintiff to be comparable, the court found that "Price Waterhouse had legitimate, nondiscriminatory reasons for distinguishing between the plaintiff and the male partners with whom she compares herself." (RE 18.) These findings have not been challenged by way of appeal and therefore must stand.

IV.

PLAINTIFF'S THEORY OF LIABILITY RESTS UPON THE INCORRECT PREMISE THAT TITLE VII PROHIBITS ANY DIFFERENCE IN GROOMING OR APPEARANCE STANDARDS APPLIED TO MALES AND FEMALES.

Even if one were to accept that plaintiff established through competent evidence in this case that one or more partners critical of plaintiff treated her differently in some fashion than they treated similarly situated males, a liability finding is not appropriate. Plaintiff's claim and the district court's ruling both rest at bottom upon the premise that Title VII prohibits an employer from making any decision based in part upon "stereotypes" concerning how female and male employees should look or act. Although plaintiff asserts that this position reflects "familiar Title VII principles on liability," (Pl. Reply Br. 29), those principles are in fact to the contrary.

It is well established -- by the decisions of this Court and other court of appeals ignored by plaintiff -- that an employer can properly make decisions based on its notion of how it wants its employees to appear and behave, and that such standards (or stereotypes) can be different for men and women employees. E.g., Craft v. Metromedia, Inc., 766 F.2d 1205 (8th Cir. 1985), cert. denied, 106 S. Ct. 1285 (1986); Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175 (3d Cir. 1985), cert. denied, 106 S. Ct. 1244 (1986); Carroll v. Talman Fed. S. & L. Ass'n, 604 F.2d 1028 (7th Cir. 1979), cert. denied, 445 U.S. 929 (1980); Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (en banc); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1973); Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973); Boyce v. Safeway Stores, Inc., 351 F. Supp. 402 (D.D.C. 1972)./3/

3/ In Fagan, Dodge, Willingham and Boyce the courts sustained rules barring long hair on men but not women. Carroll ruled that an employer could impose different dress requirements on men and women but could not require only women to wear uniforms on the offensive stereotypical premise that women could not be expected to exercise good judgment in choosing business apparel, but men could. 604 F.2d at 1033 n.17. In Bellissimo the court found no violation where the plaintiff was a "strident, touchy, and difficult employee" and her supervisor had criticized her clothes as "too tight fitting, too 'flashy,' and . . . not in keeping with the department's [unwritten] policy of dressing in a conservative style" and also criticized her for dancing with a male client at a bar and leaving with him. 764 F.2d at 177, 181, 182. In Craft, the unsuccessful plaintiff had been lawfully removed as a television news anchor after extensive comments on her apparel (her clothes were said to be "too masculine"), including audience surveys showing

(Footnote continued)

In general, such standards are regarded as matters of "managerial responsibility," Willingham, 507 F.2d at 1091; Fagan, 481 F.2d at 1125, which raise issues that tend to be "nonjusticiable" and not for the courts to resolve. Craft, 766 F.2d at 1215; Fagan, 481 F.2d at 1123; Boyce, 351 F. Supp. at 404. That is so whether the employer's standards reflect "customary" business standards or social norms of the community, Carroll, 604 F.2d at 1032; Willingham, 501 F.2d at 1087, or whether they be "out of touch" or aberrational. Craft, 766 F.2d at 1215; Bellissimo, 764 F.2d at 182; Boyce, 351 F. Supp. at 404.

Title VII is implicated by such standards only where they are intended to impose distinct disadvantages on one sex based on sexual "amimus," Craft, 766 F.2d at 1215; Bellissimo, 764 F.2d at 181, or where they are "demeaning" or "offensive" stereotypes, Craft, 766 F.2d at 1215 n.12; Carroll, 604 F.2d at 1033, tied to "immutable" characteristics or forces beyond the control of employees of that sex, Willingham, 507 F.2d at 1091;

(Footnote continued)

that she had a negative image relative to other anchor women, and after unprecedented steps were taken with respect to plaintiff alone to address the image problems. Male and female anchors were subject to different "dos" and "don'ts," the standards for males cautioning against "frivolous" colors and styles damaging their "authority," and the females' standards emphasizing "the female stereotype of 'softness,' and bows and ruffles," and "fashionableness" and advising against "tight sweaters or overly 'sexy' clothing." 766 F.2d at 1208-09, 1214, 1215.

Dodge, 488 F.2d at 1336; Fagan, 481 F.2d at 1125, or where they substantially interfere with the exercise of protected "fundamental" rights. Willingham, 507 F.2d at 1091; Dodge, 488 F.2d at 1337. The use of sexual models or stereotypes is not prohibited where done in good faith and incidental to some other legitimate purpose, such as a focus on the style of all employees. Craft, 766 F.2d at 1215. Where the line should be drawn between permissible and impermissible use of sexual stereotypes is often a question of degree. Dodge, 488 F.2d at 1336-37. As the district court observed in Boyce, while the laws concerning sex discrimination are important, "[t]hey must be realistically interpreted, or they will be ignored or displaced. Ours should not be an effort to achieve a unisex society." 351 F. Supp. at 404.

As for the application of these familiar Title VII principles in this case, even assuming that plaintiff established that Price Waterhouse partners held a stereotyped expectation of how females should appear, plaintiff did not prove and the court did not find any facts sufficient to support the conclusion that sex stereotypes played an impermissible role in the decision to place plaintiff on hold. There was no evidence or finding that the firm used demeaning or offensive stereotypes of women based on immutable characteristics, or stereotypes that substantially impinged upon the exercise of protected fundamental rights. Nor was

there any evidence or finding that stereotypes played a role only with respect to female employees, and not male employees.

Plaintiff did not prove that she was appraised by any particular partner in light of a stereotype that was offensive, demeaning, or prejudicial to female candidates. Rather, she claims in effect that one of her supporters opined she would have fared better if she had been more "womanly," i.e., if she had fit better his model of how female employees should conduct themselves. Thus, she was assertedly prejudiced not because she was a woman, but because she was insufficiently a woman (just as a male candidate might be prejudiced for being insufficiently "manly").

The most that plaintiff can be said to have established is that she was appraised by her supporters in comparison with a model or stereotype that differed in some particulars from the model they used in appraising male employees. But that is not a violation of Title VII./4/

4/ The limited application of Title VII in this area was recognized in the article upon which the district court relied. (RE 24 n.11, 29 n.15.) Taub, Keeping Women in Their Place: Stereotyping Per Se As A Form of Employment Discrimination, 21 B.C.L. Rev. 345, 418 (1980). It would be particularly unfair to impose liability upon Price Waterhouse for actions taken not only on the basis of implications of comments that could be established only with the assistance of an expert, and before it was clear that Title VII was even applicable to the decision in question, see Bishopp v. District of Columbia, No. 85-5329 (D.C. Cir. April 18, 1986), slip op. 15 n.11, but under an interpretation of Title VII that had not yet been endorsed by the courts.

V.

PLAINTIFF IS INCORRECT IN ASSERTING THAT PRICE WATERHOUSE DID NOT ADDRESS RULE 52 AS INTERPRETED IN ANDERSON v. BESSEMER CITY.

Plaintiff complains that defendant's brief did not specifically mention Rule 52 or Anderson v. Bessemer City, ____ U.S. ____, 105 S. Ct. 1504 (1985), (Pl. Reply Br. 2, 20), overlooking defendant's reliance, (Def. Br. 25), upon this Court's subsequent decision in Cuddy v. Carmen, 762 F.2d 119 (D.C. Cir.), cert. denied, 106 S. Ct. 597 (1985), which discussed and applied both Rule 52 and Anderson. In Cuddy, the Court made clear that a factual finding is "clearly erroneous" if either it is "without substantial evidentiary support" or "was induced by an erroneous application of the law." 762 F.2d at 124. Here, the findings of the trial court fail on both grounds. Moreover, the court failed to make findings on key issues./5/

5/ The principles governing application of the "clearly erroneous" rule announced in Cuddy are not altered by this Court's recent decision in Bishopp v. District of Columbia, No. 85-5329 (D.C. Cir. April 18, 1986), upon which plaintiff now relies. (Pl. Reply Br. 16, 20.) In arguing that the trial court erred insofar as it required proof that defendant intentionally sought to force plaintiff to resign, (Pl. Reply Br. 33, 35), plaintiff conveniently overlooks the portion of Bishopp addressing "constructive discharge," where the Court reiterated the standard that "'[a] finding of constructive discharge depends on whether the employer deliberately made working conditions intolerable and drove the employee into "an involuntary quit"' (citations omitted). A finding of constructive discharge requires a finding of intentional discrimination plus a finding of 'aggravating factors' that suggest that the complainant was driven to quit." Slip op. at 18.

As for the substantiality of the evidence, this is not a case in which plaintiff's theory of liability rested upon the fact-finder having credited the testimony of plaintiff's witnesses rather than defendant's witnesses. To the contrary, on the theories that turned on testimony of witnesses, the court ruled for defendant./6/ Rather, plaintiff's differential stereotype theory rested entirely upon facts not in dispute, principally written statements made in the evaluation process.

6/ For example, after hearing testimony from plaintiff, Mr. Beyer (the head of OGS), Mr. Epelbaum (plaintiff's critic in OGS), and Mr. Connor (the head of the Policy Board), the court specifically found (1) that plaintiff in fact had substantial deficiencies in her interpersonal skills; (2) that the Policy Board's reliance on such deficiencies in deciding to "hold" plaintiff was not pretextual; (3) that defendant did not intentionally discriminate against plaintiff by treating her interpersonal deficiencies differently than it treated such deficiencies in men; (4) that plaintiff's opponents in OGS were not discriminatorily motivated; and (5) that, while it was "unlikely" that plaintiff would be made a partner, defendant had not made her working conditions intolerable nor treated her in such a way as to leave her no reasonable option but to resign.

Without attempting to show that any fact finding was "clearly erroneous," plaintiff repeatedly makes assertions that are inconsistent with the trial court's findings. For example, plaintiff relies upon statistics, (Pl. Reply Br. 13 n.5), which the trial court rejected as being "wholly inconclusive" and so "fragile" that no conclusion could be drawn from them. (RE 20.) Similarly, plaintiff asserts that as a result of the OGS decision not to recommend her for partner, her chances "were over," her opportunities "had ended," and she had "no meaningful chance" or "no chance;" it was "the death knell to [her] chances for partnership." (Pl. Reply Br. 32, 34, 35, 36, 37.) She also repeatedly invokes the court's hyperbolic comment in colloquy at trial about waiting for lightning to strike. (Pl. Br. 30, 33.) The court's findings and conclusion, however, did not go so far as plaintiff asserts, in that the court concluded only that it was "unlikely" that she would become a partner. (RE 32.)

In challenging the trial court's acceptance of that theory, Price Waterhouse is not challenging a choice between "two permissible views of the evidence," Anderson, ____ U.S. at ____, 105 S. Ct. at 1512, but rather is contending that, on the entirety of the record here, plaintiff's stereotype theory did not constitute a "permissible view of the evidence" and that acceptance of it was induced by erroneous application of the law.

To be sure, plaintiff might have developed a record which supported such a theory. For example, plaintiff might have questioned those who made assertedly stereotype-based comments, in an attempt to determine whether the negative comments were in fact "overstated" or "overblown," (Pl. Reply Br. 8, 9), because plaintiff did not conform to the commentor's stereotypes for female employees. Through such questioning plaintiff might have "wrung out" any reliance on sexual stereotypes and established whether, without them, "there would have been fewer negative comments" and those that remained negative "would have been less vehement." (Pl. Reply Br. 28.) On the present record, however, these indispensable elements of plaintiff's case remain wholly matters of speculation without an evidentiary foundation. That gap, moreover, could not properly be filled by having such speculation offered by plaintiff's expert witness, rather than by plaintiff or her

counsel, for reasons we have already noted, without meaningful response by plaintiff. (Def. Br. 11 n.4, 29-32 and n.12)./7/

Similarly, plaintiff might have questioned the Policy Board to establish whether "enough of the members. . . voted against plaintiff because of" the assertedly tainted comments, Banerjee v. Board of Trustees, 648 F.2d 61, 65 (1st Cir.), cert. denied, 454 U.S. 1098 (1981),/8/ and what they would have done if there had been fewer or less intense negative comments about plaintiff./9/ Had plaintiff built such a record, the

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7/ Plaintiff has not even attempted to defend the trial court's erroneous admission of the testimony of plaintiff's so-called expert, who was predisposed to find sexual stereotypes. That testimony went no further than to indicate that commenters may have used sexual stereotypes; it did not suggest that such stereotypes were used only as to women, or that the stereotypes implicit in the comments were offensive or demeaning to women.

8/ Plaintiff has simply ignored the requirement to prove that a sufficient number of the members of a collegial body based their decisions on impermissible factors. In analogous circumstances the courts have held that evidence of statements reflecting bias are not relevant or sufficient to prove a violation unless made or endorsed by those who made the adverse decision. E.g., Kumar v. Board of Trustees, 774 F.2d 1, 10, 19-21 (1st Cir. 1985); Stendebach v. CPC Int'l, Inc., 691 F.2d 735, 738 (5th Cir. 1982), cert. denied, 461 U.S. 944 (1983); Sorosky v. Burroughs Corp., 37 FEP Cases 1510, 1518-19 (C.D. Cal. 1985).

9/ Even if plaintiff had proven the Board's "hold" decision to have been unlawfully affected by impermissible sex stereotyping, she would have been entitled to no more than a nullification of that action, i.e., to be reconsidered by the Policy Board. Compare Darnell v. City of Jasper, 730 F.2d 653, 656 (11th Cir. 1984) (successful plaintiff entitled to take test unlawfully denied, but not to instatement to position);

(Footnote continued)

trial court might not have found it impossible to say whether plaintiff "would have been elected partnership if the Policy Board's decision had not been tainted by sexually biased evaluations." (RE 31.) Having herself failed to make a record below, plaintiff now is forced to argue that it was defendant's burden to make such a record as a matter of remedy, rather than her burden to do so in order to prove a violation and establish liability. As we have shown, however, plaintiff has misperceived the parties' burdens.

VI.

THE COURT IN A CASE INVOLVING ALLEGED DISPARATE TREATMENT MUST FIND AN INTENT TO DISCRIMINATE.

As plaintiff's reply reveals, the findings adverse to plaintiff below make it infeasible for her to defend the district court's decision as one which comports with usual or familiar principles of Title VII liability. Based on findings that plaintiff does not challenge and which cannot be called "clearly erroneous," the district court rejected plaintiff's claims that defendant's evaluation or selection practices had a "disparate impact" on plaintiff and other women because of

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(Footnote continued)

Fields v. Clark Univ., 40 FEP Cases 670, 672 (D. Mass. 1986) (successful plaintiff denied tenure to be rehired and reconsidered free of discrimination, because "plaintiff had not proved on this record she is entitled to tenure," only that denial was impermissibly affected by sexual discrimination).

their sex (RE 30 n.16); that Price Waterhouse was guilty of "disparate treatment" of plaintiff because of her sex (RE 17-21); and that plaintiff's failure to become a partner was due to any class based animus against women or to a discriminatory motive or purpose. (RE 28.) The trial court properly recognized at one point that in order to prevail plaintiff had to prove that Price Waterhouse's treatment of plaintiff was accompanied by a "discriminatory motive or purpose." (RE 25.) Further, the court found that it could not label any negative comments about plaintiff as being motivated by an intent or purpose to treat her differently or to discriminate. (Id.)

Price Waterhouse noted in its opening brief that liability cannot be imposed under the disparate treatment doctrine unless an intent to discriminate or an intent to treat plaintiff differently is found. Plaintiff has responded by citing cases involving the imposition of liability against employers in circumstances where members of the workforce had engaged in sexual harassment without the employer's direct knowledge. In each of those cases, an intent to adversely treat a female because of her sex is involved. The issue in those cases is whether the intent to discriminate by a member of the workforce will be attributed to the employer and whether liability will be imposed upon the employer. In this case, there is no finding of an intent to discriminate by any person at Price Waterhouse. In short, there is no basis for invoking the principles of the sexual harassment cases here.

There being no intent to discriminate found by the district court, the imposition of liability under the doctrine of disparate treatment should be reversed.

VII.

CONCLUSION

For the reasons set forth above and in the Brief for Appellee - Cross Appellant, Price Waterhouse submits that the district court's decision must be reversed.

Respectfully submitted,

Dated: _____

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